BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PREM SOOD	)	
Claimant	)	
	)	
VS.	)	
	)	
GEAR FOR SPORTS, INC.	)	
Respondent	)	Docket Nos. 1,050,604
	)	1,051,069
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the July 21, 2010 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

The Administrative Law Judge (ALJ) consolidated these claims for purposes of the preliminary hearing and went on to deny claimant's request for benefits under both docketed claims. The ALJ concluded that as to Docket No. 1,051,069, claimant failed to prove he sustained a repetitive injury. And as to Docket No. 1,050,604, the claimant "prove[d] a compensable second injury on February 13, 2010", but the medical evidence failed to persuade the ALJ that claimant's need for surgery was causally related to the February 13, 2010 accident. The ALJ ordered respondent to pay medical mileage associated with treatment provided immediately following the February 13, 2010 accident and that aspect of the ALJ's Order is not in dispute.

Claimant has appealed and contends the ALJ's Order should be reversed. Claimant maintains the evidence does, in fact, support his claim that he sustained a series of traumas beginning in August of 2007, when he returned to work for respondent and continuing until his last date of work, May 22, 2010. Moreover, claimant argues that he gave timely notice of his repetitive series of accidents. Claimant also argues that the

evidence contained within the record "does not support the Administrative Law Judge's conclusion that the [c]laimant's need for surgery arose before the February 13, 2010 accident (Docket No. 1050604)."[1]

Respondent urges the Board to affirm the ALJ's Order. Respondent contends that the evidence put forth at the preliminary hearing reflects two separate, acute injuries, only one of which is reflected in the Application for Hearing. And of the one (February 13, 2010) that is encompassed by an Application for Hearing (Docket No. 1,050,604), claimant has failed to establish it is more likely than not that his need for surgery to the left knee is causally connected to that accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ succinctly and adequately set forth the facts and circumstances surrounding these two docketed claims. This Board Member specifically adopts that statement as its own and will not unnecessarily repeat those facts herein.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[2] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[3]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[4]

After considering the evidence offered by the parties, the ALJ concluded as follows:

> The record did not prove a repetitive injury, i.e. an injury of gradual onset occurring on no specific date. The record showed the claimant had some sort of specific

---

[1] Claimant's Application for Review at 2 (filed July 23, 2010).

[2] K.S.A. 2005 Supp. 44-501(a).

[3] K.S.A. 2005 Supp. 44-508(g).

[4] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991), *rev. denied* 249 Kan. 778 (1991).

> injury to the knee in October, 2009 from some sort of work. This injury, if it occurred while working for the respondent, was not reported and the claimant would not be entitled to benefits.
>
> The record did prove a compensable second injury on February 13, 2010 when the claimant struck his knee while climbing stairs doing his job for the respondent. The question becomes whether the proposed surgery is treatment for an injury received in this accident or treatment of a condition that existed before the accident.[5]

As a result, the claimant was denied an authorization for surgery and temporary total disability benefits but respondent was nonetheless required to pay medical mileage associated with claimant's immediate care following the February 13, 2010 accident.[6]

This Board Member has reviewed the evidence presented to the ALJ[7] and finds the Order should be affirmed. As the preliminary hearing transcript shows, claimant struggles with the English language and often provided conflicting answers when questioned about his past medical and current work history. At one point, when asked why he sought treatment for his knee complaints in the Fall of 2009, he responded "I have same problems with the knee"[8] apparently referring to his earlier treatment in 2003. In spite of this confusion, it is nonetheless clear that claimant sustained a left knee injury in 2003 for which he received surgery, but then returned to work at full duty. Thereafter, he returned to work for respondent in August 2007 as an order picker.

According to claimant, his job for respondent required him to regularly lift boxes, bend, stoop, and climb stairs. Claimant also concedes he owns a convenience store and works in the store, along side his wife and son, although he maintains he only does paperwork. In the fall of 2009, he noticed pain in his left knee and sought treatment from his personal physician who had treated his knee in 2003. The medical records from October 13, 2009 (when claimant first sought care) are unclear as to whether claimant clearly designated this as a work injury *for this employer* or *while working at his convenience store*. All the records show is that he had a 2 week history of pain and "may

---

[5] ALJ Order (July 21, 2010) at 2.

[6] Respondent does not take issue with that portion of the ALJ's Order that compels payment of the medical mileage expenses associated with Docket No. 1,050,604 and associated with the immediate care following that accident.

[7] Claimant's brief to the Board contained as attachments documents which were not presented to the ALJ at the preliminary hearing and were therefore not considered by the ALJ. Accordingly, those documents were not reviewed for purposes of this appeal.

[8] P.H. Trans. at 8.

have injured it while lifting a box".[9] At his next office visit on November 10, 2009 indicates that claimant's injury "did happen at work, but he has not filed any workers' compensation paperwork."[10] At no point did claimant provide respondent with any notice of this injury.

There is a gap in claimant's treatment until February 13, 2010 when claimant says he fell and twisted his left knee while in respondent's employ.[11] At the preliminary hearing, claimant testified that slipped on a stair[12]. He indicated in an injury evaluation form that he was "walking" when he fell on his knee.[13] He notified his employer and was referred to an occupational facility, where he was diagnosed with a knee strain. An MRI was performed and claimant ultimately found his way back to Dr. Don Miskew, a physician who had been involved in claimant's knee treatment in 2003.

Dr. Miskew's office note states that an MRI revealed a torn meniscus *which was suspected in October 2009*.[14] Dr. Miskew recommended arthroscopic surgery to the knee, but voiced no opinion about whether the February 13, 2010 accident played any part in the need for surgery.

This Board Member finds these facts fully support the ALJ's findings and conclusions. As to claimant's alleged series of microtraumas, neither the ALJ, nor this Board Member are persuaded that claimant sustained a series of injuries. This record does not reveal the nature of claimant's job, as distinguished from his other work activities at his own business and how that job took its toll upon claimant over time. To the contrary, it appears that in October 2009 he began to suffer pain in his left knee after lifting a box, a knee he had surgically treated in 2003. Based upon this evidence, this Board Member finds the ALJ's Order as it relates to Docket No. 1,051,069 should be affirmed as claimant has failed to establish that he sustained a series of injuries.

Likewise, as to the acute injury of February 13, 2010, this Board Member agrees with the ALJ's conclusion that claimant has failed to establish a causal connection between his need for surgery and his otherwise compensable accident. As evidenced by the medical records, the physician's assistant in Dr. Miskew's office had already suspected a torn meniscus in claimant's knee back in October and November, 2009. As noted by the

---

[9] *Id.*, Cl. Ex. 3 at 4 (Dr. Christopher Welch's Oct. 13, 2009 office note).

[10] *Id.*, Cl. Ex. 3 at 3 (Dr. Welch's Nov. 10, 2009 office note).

[11] *Id.*, Resp. Ex. A (Dr. William H. Tiemann's Feb. 15, 2010 office note).

[12] *Id.* at 9.

[13] *Id.*, Resp. Ex. B (Injury Evaluation Form).

[14] *Id.*, Cl. Ex. 3 at 1 (Dr. Miskew's May 3, 2010 office note).

ALJ, claimant's symptoms in February of 2010 were much the same as those voiced in October and November 2009. No physician has indicated that claimant's need for surgery to his knee is due to the February 13, 2010 accident. Indeed, the evidence offered at the preliminary hearing supports the ALJ's conclusion that claimant's torn meniscus most likely pre-dated the February 13, 2010 accident. Thus, the ALJ's Order as it relates to Docket No. 1,050,604 is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[15] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated July 21, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2010.

_____
JULIE A.N. SAMPLE
BOARD MEMBER

c: Judy A. Pope, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

[15] K.S.A. 44-534a.